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80-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-14

FAYETTEVILLE STREET CHRISTIAN SCHOOL, *et al.*
Appellants,
v.
STATE OF NORTH CAROLINA, *et al.*
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NORTH CAROLINA

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

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Pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, appellees move the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth. In the alternative, appellees move the Court pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the Supreme Court of North Carolina.

JURISDICTIONAL STATEMENT

This is a direct appeal under 28 USC §1257(2) from the Supreme Court of North Carolina denying on the grounds that it was premature appellants' appeal upon a purported assertion of a substantial question arising under the Constitution of the United States and remanding the case to the trial court for further proceedings. The original decision of the Supreme Court of North Carolina containing the judgment of that court here sought to be reviewed is reported in 299 N.C. 351, 261 S. E. 2d 908. The opinion of that court containing its judgment after rehearing, reaffirming its original judgment, is reported in 299 N. C. 731, 265 S. E. 2d 387. The opinion of the North Carolina Court of Appeals containing its judgment from which defendants appealed to the Supreme Court of North Carolina is reported in 42 N.C. App. 665, 258 S.E. 2d 459. Appellants contend that N.C.G.S. 110-98, as applied to them, is in conflict with the Free Exercise of Religion Clause of the First Amendment, incorporated into the Fourteenth Amendment, to the Constitution of the United States and that the judgment of the Supreme Court of North Carolina that the order from which appellants appealed to that court was not appealable under State law is a final judgment which denies to them their rights under the First and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On October 20, 1978, the Child Day-Care Licensing Commission of the North Carolina Department of Administration and Joseph W. Grimsley, Secretary of Administration, by and through the Attorney General of

North Carolina, filed this action against 11 church-operated day-care facilities, the chief administrative officers (operators) of these day-care facilities and all others similarly situated. The plaintiffs (appellees herein) sought a declaration of the extent of their right to regulate day-care facilities by licensing together with a preliminary and permanent injunction enjoining the defendants (appellants herein) from operating any day-care facilities until such time as they had obtained valid licenses to operate their day-care facilities pursuant to Article 7 of Chapter 110 of the General Statutes and the regulations promulgated thereunder. Plaintiffs' motion for preliminary injunction was heard at a special session of the Wake County, North Carolina, Superior Court on December 8, 1978. By order entered December 11, 1978, the Superior Court enjoined the named defendants, their agents, servants, employees, members or anyone else acting by, under, through or in concert with them from opening or operating any day-care facilities until such time as they had complied with Article 7 of Chapter 110 of the General Statutes of North Carolina and the regulations promulgated thereunder.

The court also considered defendants' motion to dismiss at the special session of December 8, 1978, and by separate order filed December 11, 1978, denied this motion.

The defendants gave notice of appeal to the North Carolina Court of Appeals, and that court granted a writ of supersedeas pending its decision. On September 4, 1979, the North Carolina Court of Appeals filed its judgment affirming the order of the Superior Court.

The defendants filed notice of appeal and petitions for discretionary review and writ of supersedeas with the Supreme Court of North Carolina. On September 25, 1979, the Supreme Court of North Carolina entered an order allowing the petition for discretionary review and the petition for writ of supersedeas. Thereafter, on February 1, 1980, the Supreme Court of North Carolina rendered its judgment that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constituted nonappealable interlocutory orders, vacating the judgment of the North Carolina Court of Appeals, vacating its own writ of supersedeas and remanding the case to the Superior Court for further proceedings. The defendants filed a petition for rehearing and the Supreme Court of North Carolina allowed this petition, reinstating its writ of supersedeas on February 20, 1980. Following the rehearing, the Supreme Court of North Carolina entered its judgment of April 8, 1980, reaffirming its original judgment, again vacating its writ of supersedeas and remanding the case to the Superior Court for further proceedings.

The defendants filed their Notice of Appeal to the Supreme Court of the United States on June 19, 1980, and served their Jurisdictional Statement upon the plaintiff appellees on July 2, 1980.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court, for the following reasons:

The opinion of the Supreme Court of North Carolina from which appellants appeal deals only with procedural questions under North Carolina law and is not intended to express that court's opinion on the constitutional issues raised by appellants nor does it affect appellants' rights under the Constitution.

Appellants argue that the federal question presented by this appeal is:

> "When a church, or a department thereof, operates, or proposes to operate a child day care center, as part of its religious ministry, upon its own property in a safe and orderly manner, may a state, consistent with the First and Fourteenth Amendments, require it, as a condition precedent to such operation, to procure a license or permit from a state agency vested by statute with a discretion to deny it?"

(Jurisdictional Statement, p. 14).

The Supreme Court of North Carolina was in fact presented with this question by appellants in their appeal to that court from an adverse determination of the question by the North Carolina Court of Appeals. Unlike the North Carolina Court of Appeals, however, the Supreme Court of North Carolina specifically refrained from expressing its opinion on this constitutional question. (Jurisdictional Statement, pp. 31-32). The court concluded "that both the denial of defendants' motion to dismiss and the granting of the preliminary injunction constitute non-appealable interlocutory orders." (Jurisdictional Statement p. 23).

Appellees contend that the opinion of the Supreme Court of North Carolina was a correct interpretation of the North Carolina statutes dealing with appeals of decisions form the trial court, N.C.G.S. 1-277 and N.C.G.S. 7A-27, and that since this opinion expressly does not pass on the federal question raised by appellants, their appeal to this Court should be dismissed.

In the complaint filed against appellants by appellees on October 20, 1978, appellees sought a declaratory judgment pursuant to Article 26 of Chapter 1 of the General Statutes of North Carolina relating to their authority to regulate appellants' day-care facilities by licensing as required by Article 7 of Chapter 110 of the General Statutes of North Carolina. Ancillary to this declaratory relief, appellees sought interim relief in the form of an injunction enjoining the appellants from operating any day-care facilties until such time as they had complied with the day-care licensing laws. Each of the eleven appellants had in the past been licensed as a day-care facility, but prior to the filing of this action each had indicated that it would no longer accept a license from the State on religious grounds. The Superior Court of Wake County granted appellees' application for a preliminary injunction based on the required findings that:

1. Probable cause existed that appellees would be able to establish their right to regulate appellants' day-care facilities; and

2. A reasonable apprehension of irreparable loss to appellees' interests existed unless the preliminary relief was granted. See *Waff Bros. v. Bank*, 289 N.C.

198, 221 S. E. 2d 273 (1976). *Pruitt v. Williams,* 288 N. C. 368, 218 S. E. 2d 348 (1975); *Conference v. Creech and Teasley v. Creech,* 256 N.C. 128, 123 S.E. 2d 619 (1962); *Huskins v. Hospital,* 238 N. C. 357, 78 S. E. 2d 116 (1953).

Appellees agree that "It is no business of courts to say what is religious practice or activity for one group is not religion under the protection of the First Amendment." *Fowler v. Rhode Island,* 345 U. S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953). However, the state's right to protect the public interest in various ways has long been recognized, and while appellants' freedom to believe remains inviolate, their freedom to act is subject to reasonable regulation for the protection of society. *Cantwell v. Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). In the case of day-care licensing, after an extensive legislative study, it was concluded that the *physical* health, safety and welfare of children in day-care facilities required the protection of minimum safeguards. Article 7 of Chapter 110 of the General Statutes was passed to provide these safeguards. The requirement of a license contained in this Article is a formality, a piece of paper to be placed on the wall of a day-care center which conforms to the minimum standards set out in the Article.

Appellees have contended throughout this matter that in resolving their conflict with appellants the applicable test of whether Article 7 of Chapter 110 of the General Statutes of North Carolina did in fact interfere with appellants' free exercise of religion is the test set out in *Wisconsin v. Yoder,* 406 U. S. 205 at 215, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Enforcement of the challenged statute is permissible if (1) the statute does

not deny the free exercise of religious belief or, if so, (2) a state interest of sufficient magnitude overrides the legitimate private interest invoking the protection of the Free Exercise Clause. When this test is applied to the facts of this case, appellees contend that it can be demonstrated that: (1) The challenged Article does *not* in any way prevent appellants from freely exercising their religion, since the standards provided in the Article relate strictly to physical health and safety protection, and since the license itself is a mere formality indicating compliance with the standards; and (2) Even if some interference could be shown, the state interest in protecting the physical health and safety of children in day care is of sufficient magnitude to override apellants' interest under the First Amendment.

The Supreme Court of North Carolina did not reach this question and has never expressed any opinion as to the contentions raised either by appellants or by appellees. Instead, the Supreme Court of North Carolina concluded that the injunction from which the appeal was taken, being designed merely to preserve the last uncontested status which existed between the parties, was purely interlocutory and was insufficient to raise on appeal the constitutional issues set out in the complaint. The Supreme Court reasoned as follows:

> "Where, as here, a party seeks on no more than pleadings and affidavits to challenge the constitutionality of a statute, not on its face but as applied to that party, and pursues that challenge by attempting to appeal from an interlocutory order, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.

These considerations are particularly relevant in the context of the case before us. Defendants do not challenge the Act on its face. They strenuously argue, however, that the Act *cannot apply to them* without exceeding the bounds of certain constitutional limitations. More specifically, they contend that the operation of each day-care center is an integral part of the ministry of its supporting church and that the mandatory state licensing of the facilities violates the free exercise of their religion. With the exception of defendants' own affidavits, however, there is nothing in the record to guide the inquiry of this Court or of any other judicial tribunal into the degree to which defendants' day-care services are in fact religious activities warranting special constitutional protection. Nor does the record reveal any factual basis, save that suggested by general statements in the pleadings, upon which to determine the extent to which the Act's regulations do in fact interfere with defendants' allegedly religious conduct. In short, defendants' assertions in their affidavits have not been tested by cross-examination; their allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded. Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants

> assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation. Absent such a record, our intervention is necessarily premature. This Court will pass upon the constitutionality of a statute *only when* the issue is squarely presented upon an adequate factual record and *only when* resolution of the issue is necessary to determine the rights of the parties before it. Nicholson v. Education Assistance Authority, 275 N. C. 439, 447, 168 S. E. 2d 401, 406 (1969); Carbide Corp. v. Davis, *supra,* 253 N.C. at 327, 116, S.E. 2d at 794." 299 N.C. at pp. 358-359.
>
> (Jurisdictional Statement pp 30-31)

Appellants have contended to this Court that they can in fact develop no additional evidence which will further clarify the constitutional issues before the court and that the decision of the Supreme Court of North Carolina is therefore a final decision which denies to them their rights under the First Amendment. The question of whether or not appellants will be able to develop additional evidence supporting their claim during a trial on the merits should not be dispositive of the issue of the appealability of this matter.

Appellants provide day care for approximately 700 children in their day-care facilities. All of the appellants held day-care licenses without any assertion that the licenses interfered with their religious beliefs until the

months immediately preceding the filing of appellees' complaint for declaratory relief. Thus, while appellants' claim of a violation of their religious freedom led appellees to seek declaratory relief, it was appellants' change of status from licensed to unlicensed day-care facilities which led appellees to seek ancillary injunctive relief to preserve the *status quo* between the parties until the constitutional issues could be resolved. Therefore, while the complaint originally filed requested two separate forms of relief, only one form of relief has in fact been granted to appellees, and it was only the propriety of this one form of relief which was the subject of appellants' appeal. The Supreme Court of North Carolina held that while an order granting preliminary injunctive relief might be appealable if there was a claim that a statute was facially unconstitutional, where, as here, the claim was only that the statutes were unconstitutional as applied to appellants, an appeal from such an order was premature.

The holding appealed from was, therefore, a narrow one, expressly intended to interpret N.C.G.S. 1-277 and N.C.G.S. 7A-27, both of which deal only with appeals from trial courts. Appellants still have the opportunity to present their constitutional questions to the trial court and if the questions are decided adverse to them, they may then appeal this decision. Since appellants' constitutional claims have not been determined by the highest state court, appellants' appeal to this Court is also premature.

CONCLUSION

For the foregoing reasons, appellees contend that either the appeal should be dismissed or the opinion of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am Special Deputy Attorney General for the State of North Carolina; that I have served three copies of the MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE TO AFFIRM JUDGMENT by depositing copies of same in the United States Mail at Washington, D.C., first class postage paid, addressed to:

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This 30th day of July, 1980.

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